**PUBLIC PROSECUTOR**

**v.**

**AUDREY KEONG MEI CHENG**

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
AHMAD FAIRUZ JCA
MOKHTAR SIDIN JCA
[CRIMINAL APPEAL NO: W-05-96 OF 1995]
20 JANUARY 1997

***CRIMINAL PROCEDURE:*** *Arrest - Further detention - Application for further detention of person arrested - Criminal Procedure Code, s. 117 - Duty of magistrate - Whether not to concern himself on the issue of legality of arrest - Whether only to inquire whether there were grounds for believing that accusation or information was well founded*

***CRIMINAL PROCEDURE:*** *Arrest - Further detention - Application for further detention of person arrested - Criminal Procedure Code, s. 117 - Police diary - Criminal Procedure Code, s. 119 - Whether incumbent on police to produce diary before Magistrate - Non-production thereof - Whether fatal*

The respondent's husband in this case was charged with an offence under s. 409 Penal Code. The respondent subsequently promised the police that she would surrender to them certain documents and cash relating to the case. The respondent did not however keep her said promise, and was as a result arrested by the police on 11 May 1994. On 12 May 1994, the police produced the respondent before the Registrar wherefore they applied to further detain her under s. 117 Criminal Procedure Code ('CPC'). The learned Registrar ruled that the respondent's arrest, in the circumstances, was unlawful, and on that ground rejected the application for detention and ordered that the respondent be released forthwith. Dissatisfied, the learned Deputy Public Prosecutor applied to the High Court for a revision of the Registrar's order, but the learned judge, having perused the record and the affidavits, affirmed the Registrar's finding and consequently declined to exercise his revisionary powers. The Public Prosecutor appealed.

**Held:**
**Per Shaik Daud Ismail JCA**

**[1]** There is nothing in s. 117 of the CPC that shows that a magistrate has to be satisfied on the legality or otherwise of the arrest before acting under the section. The correct view is that, at that stage of the proceedings, it

is not for the magistrate to decide on the legality or otherwise of the arrest. To do so would require the magistrate to embark on an enquiry which may in turn necessitate the calling of witnesses. That is not the purport of s. 117.

**[2]** Section 117 CPC is a machinery to enable persons arrested under s. 28 CPC to be detained in custody for longer than twenty-four hours where it appears that investigations cannot be completed within that period. What the magistrate has to decide at that stage is whether there are grounds for believing that the accusation or information is well founded. The Registrar was therefore wrong in law when she ordered the release of the respondent solely on the ground that the arrest was unlawful.

**[3]** Section 117 CPC provides that the police officer making the investigation shall forthwith transmit to the magistrate a copy of the entries in the diary as prescribed in s. 119 CPC. Section 117 thus makes it mandatory for the police officer seeking a detention order of an arrested person to produce a copy of such diary. No such copy of the diary has been produced before the Registrar here, and the Registrar, therefore, was right in law to refuse to order the further detention of the respondent.

**[4]** The information given to the Registrar only shows that the respondent would only be a potential witness against her husband. Clearly, it would be an abuse of the process of law for police officers to use the machinery of s. 117 CPC to compel witnesses or potential witnesses to come forward to assist in their investigation.

**[5]** Since the provisions of s. 117 CPC has not been complied with, the Registrar was right, albeit for a different reason, not to order further detention of the respondent.

***Obiter dictum***

**[1]** In exercising his powers under s. 325 CPC, the learned judge ought to confine only to the record of the proceedings and nothing else. An application for revision is essentially a criminal proceeding, and affidavit evidence, therefore, has no place in such proceedings.

*[Appeal dismissed.]*

*[**Bahasa Malaysia** Translation of Headnotes]*

***PROSEDUR JENAYAH:*** *Tangkapan - Tahanan lanjut - Permohonan untuk tahanan lanjut orang yang ditangkap - Seksyen 117 Kanun Prosedur Jenayah - Tugas Majisteret - Samada tidak perlu melibatkan dirinya dengan soalan tentang keesahan penangkapan - Samada hanya perlu meneliti samada wujud alasan untuk mempercayai bahawa tuduhan ataupun maklumat mempunyai asas yang kukuh - Kanun Prosedur Jenayah, s. 117*

***PROSEDUR JENAYAH:*** *Tangkapan - Tahanan lanjut - Permohonan untuk tahanan lanjut orang yang ditangkap - Seksyen 117 Kanun Prosedur Jenayah - Dairi polis - Seksyen 119 Kanun Prosedur Jenayah - Samada polis berkewajipan untuk menunjukkan dairi kepada Majisteret - Kegagalan menunjukkan dairi - Samada memudaratkan*

Suami responden dalam kes ini telah dituduh dengan satu kesalahan di bawah s. 409 Kanun Keseksaan. Responden kemudiannya berjanji kepada polis untuk menyerahkan beberapa dokumen serta wang tunai berhubung dengan kes tersebut. Responden bagaimanapun mungkir dengan janjinya, dan akibatnya telah ditangkap oleh polis pada 11 Mei 1994. Pada 12 Mei 1994, polis telah membawa responden ke hadapan Pendaftar dan di mana mereka memohon untuk menahan responden di bawah s. 117 Kanun Prosedur Jenayah ('KPJ'). Pendaftar yang bijaksama memutuskan bahawa penangkapan responden, dalam halkeadaan yang wujud, adalah tak sah, dan atas alasan itu menolak permohonan untuk penahanan lanjut serta memerintahkan supaya responden dibebaskan dengan serta merta. Tidak berpuas hati, Timbalan Pendakwa Raya yang bijaksana memohon kepada Mahkamah Tinggi untuk penyemakan perintah Pendaftar, tetapi Hakim yang bijaksana, setelah meneliti rekod dan beberapa afidavit, telah mengikrarkan keputusan Pendaftar dan seterusnya menolak untuk melaksanakan kuasa semakannya. Pendakwa Raya telah merayu.

**Diputuskan:**
**Oleh Shaik Daud Ismail HMR**

**[1]** Tidak ada apa-apa pun dalam s. 117 KPJ yang menunjukkan bahawa seseorang Majisteret itu mesti terlebih memuaskan hatinya bahawa sesuatu penangkapan itu sah atau sebaliknya sebelum bertindak di bawah seksyen tersebut. Pandangan yang betul adalah, pada peringkat prosiding sedemikian, ianya bukan tugas Majisteret untuk membuat keputusan tentang sah atau tidaknya penangkapan tersebut. Untuk berbuat demikian memerlukan Majisteret mengadakan satu pemeriksaan yang mungkin akan melibatkan pemanggilan saksi-saksi. Ini bukanlah tujuan s. 117.

**[2]** Seksyen 117 KPJ adalah suatu mekanisma untuk membolehkan orang-orang yang ditangkap di bawah s. 28 KPJ ditahan untuk jangka masa yang melebihi dua puluh empat jam di mana penyiasatan tidak dapat disempurnakan dalam tempoh tersebut. Apa yang Majisteret perlu putuskan di peringkat ini adalah menentukan samada wujud alasan untuk mempercayai bahawa tuduhan ataupun maklumat adalah berasas. Pendaftar dengan itu adalah salah di sisi undang-undang bilamana beliau memerintahkan pembebasan responden semata-mata atas alasan bahawa penangkapan beliau tak sah.

**[3]** Seksyen 117 memperuntukkan bahawa pegawai polis yang menjalankan siasatan hendaklah menyerahkan kepada majisteret sesalinan catatan dari dairi seperti yang diterangkan dalam s. 119. Seksyen 117 dengan itu telah mewajibkan seseorang pegawai polis yang memohon untuk menahan orang yang ditangkap supaya mengemukakan salinan dairi tersebut. Tiada salinan dairi berkenaan dikemukakan di hadapan Pendaftar dalam kes ini, dan Pendaftar, dengan itu, adalah betul di sisi undang-undang untuk menolak memerintahkan penahanan lanjut responden.

**[4]** Maklumat yang diberi kepada Pendaftar hanya menunjukkan bahawa responden hanya berkemungkinan akan menjadi saksi terhadap suaminya. Adalah jelas bahawa ianya merupakan satu penyalahgunaan proses undang-undang bagi seorang pegawai polis untuk menggunakan mekanisma s. 117 untuk memaksa saksi-saksi ataupun mereka-mereka yang berpotensi untuk menjadi saksi untuk datang kehadapan untuk membantu mereka dalam siasatan.

**[5]** Oleh kerana peruntukan s. 117 KPJ tidak dipatuhi, Pendaftar adalah betul, walaupun atas alasan yang berbeza, dalam tidak memerintahkan penahanan lanjut responden.

***Obiter dictum***

**[1]** Dalam melaksanakan kuasa-kuasanya di bawah s. 325 KPJ, Hakim yang bijaksana harus menumpukan perhatiannya hanya kepada rekod prosiding dan bukan yang selainnya. Permohonan untuk semakan adalah pada asasnya satu prosiding jenayah, dan keterangan afidavit, dengan itu, tidak mempunyai tempat dalam prosiding sedemikian.

*[Rayuan ditolak.]*

**Legislation referred to:**
Criminal Procedure Code, ss. 28, 117, 119, 325
Penal Code, s. 409

*[Appeal from High Court Malaya, Kuala Lumpur; Criminal Application No: 44-16-1994]*

*For the appellant - Kamaruzzaman Abd Jalil, DPP*
*For the respondent - Yusuf Khan; M/s Yusuf, Lee, Pathma & Marbeck*

**JUDGMENT**

**Shaik Daud Ismail JCA:**

This is an appeal by the Public Prosecutor from the decision of the High Court which had rejected an application by the Public Prosecutor, to exercise its revisionary powers.

The facts of the case are that on 14 April 1994 as a result of a police report *vide* Jalan Bandar report No. 6191/94, the police arrested one Lim Chin Teik, the husband of the respondent in this appeal. On 5 May 1994 the said Lim Chin Teik was formerly charged in the Session Court Kuala Lumpur for an offence of criminal breach of trust under s. 409 of the Penal Code. He claimed to be tried and was released on bail of RM500,000.

In the course of their investigation, the police ascertained that the respondent herein was in possession of share scripts and money pertaining to the criminal breach of trust case. On 29 April 1994 the respondent turned up at Bukit Aman where her husband the said Lim Chin Teik was detained, and allegedly agreed that she would surrender all share certificates and cash RM70,000.

She failed to do so and thereafter never turned up at Bukit Aman. On 11 May 1994 at about 10.30am Corporal 64212 Hamidah bt. Abdul Rahman happened to meet the respondent at Block K13, Magistrate's Court, Jalan Duta and immediately arrested her. She was taken into custody and on the next day 12 May 1994 at about 8.15 am she was produced before the Registrar Puan Fadzilah Masaya bt. Mazlan for her to be detained further under s. 117 Criminal Procedure Code (CPC).

The learned Registrar rejected the application on the sole ground that the arrest of the respondent was unlawful and directed the respondent to be released. Against this order of the Registrar the Public Prosecutor applied to the High Court for the learned judge to exercise his revisionary powers, under s. 325 CPC. After hearing arguments, the learned judge agreed with the Registrar's finding and order and declined to exercise his revisionary powers.

This appeal is on a fundamental point of law on the arrest and detention under s. 117 CPC. Section 117 provides:

(1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by s. 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation **shall forthwith transmit to the Magistrate a copy of the enteries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before the Magistrate;**

(2) The Magistrate before whom an accused person is produced under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit for a term not exceeding fifteen days in the whole. If he has no jurisdiction to try the case and considers further detention unnecessary he may order the accused person to be produced before a Magistrate having such jurisdiction or, if the case is triable only by the High Court, before himself or another Magistrate having jurisdiction with a view to committal for trial by the High Court;

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(The emphasis is ours)

The issue before the High Court and before us is whether the learned Registrar was right in law in rejecting the application for further detention of the respondent on the ground that her arrest was unlawful. The learned judge was of the view that in order for a Magistrate to exercise her discretion under s. 117 CPC the arrest in the first place must be a lawful arrest. The learned Deputy Public Prosecutor submitted before us that it was not the duty of the Magistrate at that stage, ie, application under s. 117 CPC, to question the legality or otherwise of the arrest. We agree with the contention of the learned Deputy Public Prosecutor. On our perusal of the provision of s. 117 CPC we could not find anywhere in that section to show that before a Magistrate can act under that section, the Magistrate has to be satisfied on the legality or otherwise of the arrest. We are of the view that at that stage of the proceedings the Magistrate is not to concern himself or herself on the issue of the legality or otherwise of the arrest. It is not for the Magistrate to decide on the legality or otherwise of the arrest. To do so would require the Magistrate to embark on an enquiry which may in turn necessitate the calling of witnesses. That, to our mind, is not the purport of s. 117 CPC. Section 117 CPC is a machinery to enable persons arrested under s. 28 CPC to be detained in custody for longer than twenty-four hours where it appears that investigations cannot be completed within that period. What the Magistrate has to decide at that stage is whether there are grounds for believing that the accusation or information is well founded. Therefore in this case we are of the view that the learned Registrar

was wrong in law when she ordered the release of the respondent solely on the ground that the arrest was unlawful.

Apart from the issue of the legality or otherwise of the respondents arrest, we think learned counsel for the respondent is on firmer ground when he raises the issue as to whether in this case the provisions of s. 117 CPC had been complied with when the respondent was produced before the Registrar.

Section 117 CPC provides that the police officer making the investigation shall forthwith transmit to the Magistrate "a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before such Magistrate." The diary herein mentioned, has been prescribed in s. 119 CPC which provides that every police officer making a police investigation shall day by day enter his proceedings in the investigation in a diary setting forth the time at which the order, if any, for investigations reached him, the time at which he began and closed investigation, the place or places visited by him and a statement of the circumstances ascertained through his investigation. Section 117 CPC makes it mandatory for the police officer seeking a detention order of an arrested person to produce a copy of such a diary failing which a Magistrate ought not to entertain the application.

In the present case, let us examine whether the provisions of s. 117 CPC has been in fact complied with. It cannot be gainsaid that where the liberty of a citizen is to be curtailed, the law must be adhered to strictly. The record in the present case, shows that no such copy of the diary, as envisaged by s. 117 CPC, was produced before the Registrar. What was in fact produced was a letter dated 12 May 1994 addressed to the Magistrate from Latt Mastura bt. Mansor from Cawangan Siasatan Jenayah Perdagangan, Bukit Aman, setting forth the facts upon which a detention order was requested for. The fact that a letter was produced before the Registrar, was conceded by the learned Deputy Public Prosecutor both in the High Court and in this appeal. He further conceded that it was not a copy of the diary as envisaged by s. 117 CPC.

In our judgment, it is mandatory for the police to produce a copy of the diary as prescribed by s. 119 CPC. The details in such a diary would provide a true picture of the proceedings in the investigation in compliance with s. 119 CPC. Since the police, in this case, failed to do this, the Registrar would be right, in law, to refuse to order the further detention of the respondent. Furthermore, on our perusal of the contents of the "letter" we find that nowhere has it been shown that the respondent has committed or been involved in any offence for her further detention in order to complete the investigation. On the contrary, the information shows that she would, in all probability, only be a potential witness against her husband. We would, without hesitation, hold

that it would be an abuse of the process of law for police officers to use the machinery of s. 117 CPC, in order to compel witnesses or potential witnesses to come forward to assist in their investigations. There are other provisions in the CPC for this purpose.

Therefore in our judgment since the provisions of s. 117 CPC has not been remotely complied with the Registrar was right albeit for a different reason, not to order further detention of the respondent.

Before leaving the subject, we would like to make one other observation. During the proceedings before the High Court a number of affidavits were filed for consideration both by the prosecution as well as by the respondent for the consideration of the learned judge. In exercising his powers under s. 325 CPC, the learned judge has to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the inferior court. In order to do this he has to examine the record of the proceedings of which has been called for by himself or, as in this case, which otherwise comes to his knowledge. In exercising his discretion, the learned judge ought to confine only to the record of the proceedings and nothing else. An application for revision being essentially a criminal proceeding, it is our view that affidavit evidence has no place in such proceedings.

For the above reasons we dismiss this appeal.

*Reported by WA Sharif*